Petition

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81-531

No. ....

IN THE

Supreme Court of the United States

October Term, 1981

In re PHONETELE, INC.,

Petitioner.

Petition for Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

By failing to issue its opinion in the instant appeal, now pending for over four years, has the Respondent breached its duty to decide the appeal?

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In re PHONETELE, INC.,

Petitioner.

PETITION FOR WRIT OF MANDAMUS.

Petitioner, Phonetele, Inc. ("Phonetele"), a California corporation, petitions this Honorable Court for a Writ of Mandamus directed to the Respondent, the United States Court of Appeals for the Ninth Circuit, and by this verified petition alleges:*

Jurisdiction; Grounds Upon Which Mandate Is Sought.

This Court has the power to issue the requested writ under 28 U.S.C. §1651(a), which provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The instant case involves an antitrust cause by petitioner against The American Telephone and Telegraph Company and certain of its affiliates, hereinafter "The Bell System." On July 26, 1977, the District Court for the Central District

*The panel before whom the case is pending consists of Anthony M. Kennedy and Betty Binns Fletcher, Circuit Judges, and Harry E. Claiborne, District Court Judge sitting by designation.

of California dismissed the petitioner's action. A copy of the District Court's Memorandum of Decision is attached as Appendix A. A notice of appeal was filed with the Ninth Circuit Court of Appeals on August 17, 1977. A copy of the Notice of Appeal is attached as Appendix B. The district court action under appeal is an order granting The Bell System's motion for judgment on the pleadings and thereby dismissing petitioner's complaint. The district Court's basis of dismissal was that the defendants, as regulated companies, were exempt from court jurisdiction because of an implied immunity from the antitrust laws.

A purely legal issue is presented on appeal. The question is one of national importance, and the parties before the Ninth Circuit Court of Appeals have presented virtually no factual arguments of any nature to the Court. The appeal has been heard twice on oral argument, the first time May 7, 1979; the second time February 6, 1980. The reason there were two oral arguments is that Shirley Hufstedler was on the original panel. She recused herself on November 20, 1979; Judge Fletcher replaced Judge Hufstedler on the panel prior to the second oral argument. Therefore, though faced with a pure issue of law and virtually no record, for over four years the Court has failed to render a decision in the matter.

Relief Is Not Available in Any Other Court.

In the instant case, there is no forum to which the petitioner can complain other than this Court since the case is pending in the United States Court of Appeals for the Ninth Circuit, and the basis of the complaint is that the Ninth Circuit court has failed to issue its opinion.

During the appeal, counsel for petitioner has had extensive correspondence with the Court. This correspondence includes citation to additional authority arising after the date

of the oral argument, submitted pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. Many communications have implored the Court to render a decision in the matter because all other Circuits which have considered this issue have decided in appellant's favor. A copy of one of petitioner's letters, dated April 9, 1981, to the Chief Judge is attached hereto as Appendix C. Despite these events, the Ninth Circuit has not rendered its opinion.

Related Cases Dependent Upon the Instant Appeal.

The United States Court of Appeals for the Ninth Circuit scheduled *DASA v. General Telephone*, No. 77-2936, for concurrent oral argument with the instant case. In addition, there is a similar case pending in the Ninth Circuit, *Selectron, Inc. v. Pacific Northwest Bell Telephone, et al.*, No. 78-2529. The *Selectron* case was dismissed by the district court for the District of Oregon wholly in reliance on the *Phonetele* case and the Ninth Circuit has notified counsel for *Selectron* that their appeal will be decided in conformity with the Court's decision in the instant appeal. On December 5, 1980, counsel for *Selectron* filed a motion before the Ninth Circuit for summary reversal in view of the fact that other United States Circuit Courts had rendered decisions since the date of the *Selectron* dismissal, all of which rejected the implied immunity argument. Selectron's counsel has not heard from the Ninth Circuit concerning the motion.

Relief Requested.

On the basis of the foregoing and the attached memorandum of points and authorities, petitioner prays that:

1) An alternative Writ of Mandamus issue under the seal of this Court commanding respondent, the United States Court of Appeals for the Ninth Circuit, as well as the Real Parties in Interest, to show cause before this Court, at a

time and place then or thereafter specified by court order, why the Ninth Circuit Court of Appeals should not render a decision in the instant appeal within thirty days of the date of issuance of the Writ of Mandamus.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of September, 1981, at Beverly Hills, California.

RICK M. STEIN

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS.

Title 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

This statute merely codifies the latest formulation, authorizing appellate courts to issue mandamus to lower courts. *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258 (1873); *McClellan v. Garland*, 217 U.S. 268 (1910).

Despite entreaties, the Ninth Circuit had not decided the instant appeal. The proposition that the Ninth Circuit Court of Appeals is created to decide cases, not to hold them under submission, is too obvious to merit any further discussion. This is a mandatory duty which is deeply imbedded in the judicial system through Constitutional and statutory precepts.

Indeed, reversal of the decision below is compelled by the Ninth Circuit's own decision in *Industrial Communications Systems, Inc. v. Pacific Tel. and Tel. Co.*, 505 F.2d 913 (9th Cir. 1975).

A case from the Ninth Circuit has discussed the issues raised by mandamus. *Bauman v. United States Dist. Court*, 557 F.2d 620 (9th Cir. 1977). The *Bauman* court, consistent with other cases, made clear that mandamus is proper, among other times, ". . . to compel it [an inferior court] to exercise its authority when it is its duty to do so." *Bauman*, at 654. [Bracketed material added.]

The instant case requests a writ of mandamus from one appellate tribunal to another. Therefore, the duty of the court is clear and the policies, disfavoring appellate inter-

ference with the trial courts, do not apply. *Bauman* at 653, including footnote 5. The instant case also does not require this Court to decide close questions of judicial administration since the delay encountered by Phonetele has been wholly unreasonable in face of the clear duty to act.

When the *Phonetele* appeal was filed in August of 1977, it was one of the first appeals raising the question of implied immunity of The Bell System from antitrust jurisdiction. However, despite the fact that Phonetele was filed first, three later-filed Court of Appeal cases in other circuits have long since been decided against The Bell System and in favor of jurisdiction. These cases are: *Essential Communciations Systems, Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979); *Northeastern Telephone Company v. American Tel. & Tel. Co.*, CA 2, No. 80-7740 (May 27, 1981); *Sound, Inc. v. American Tel. & Tel. Co.*, CA 8, No. 80-1047 (August 25, 1980). An important, fully briefed, district court case was decided after Phonetele's appeal. *Litton Systems v. American Tel. & Tel. Co.*, 487 F.Supp. 942 (SDNY, 1980), also denying implied immunity to The Bell System. Indeed, in light of the now steady stream of indistinguishable appellate and district court cases in favor of the petitioner's position herein, there remains no great controversy before the Court. If there can be any doubt as to the merits of the appeal, recently this Court decided *National Gerimedical Hospital v. Blue Cross*, 49 U.S.L.A. 4672 (June 15, 1981). In *National Gerimedical*, this court unanimously rejected the notion of implied immunity from the antitrust laws.

The question raised in the instant case is important to the administration of the nation's antitrust laws. Furthermore, petitioner suggests that the failure of the Ninth Circuit to render an opinion in this matter after two oral arguments and the passage of over four years is an intolerable diver-

gence from recognized standards of judicial administration. Therefore, the facts supporting the requested extraordinary relief are compelling. The issuance of a Writ of Mandamus is justified in the instant case.

If there were complex factual issues to be resolved, or substantial ambiguity as to how the legal issue has been decided by other persuasive and governing authorities, perhaps the delay would be understandable. As pointed out above, however, in the instant case there is no justification for the Court's failure to render a decision. Petitioner therefore prays that a Writ of Mandamus be issued directing the Ninth Circuit Court of Appeals and the Real Parties in Interest show cause why the Ninth Circuit should not be required to render a decision in the instant case within thirty (30) days of the date of the writ's issuance.

DATED: September 9, 1981.

Respectfully submitted,

RICK M. STEIN,
SIGELMAN & STEIN,
A Law Corporation,
Attorneys for Petitioner.

APPENDIX A.

Memorandum of Decision of District Court.

United States District Court, Central District of California.

Phonetele, Inc., Plaintiff, v. American Telephone and Telegraph Company; Western Electric Company, Incorporated; Bell Telephone Laboratories, Incorporated, Defendants. Case No. CV 74-3566-WPG.

Filed July 26, 1977.

Phonetele, Inc. filed this antitrust suit against American Telephone and Telegraph, Inc. (AT&T), Western Electric Co., Inc. and Bell Telephone Laboratories, Inc., charging violations of the Sherman (15 U.S.C.A. §§ 1, 2 (Supp. 1977)) and Clayton (15 U.S.C. § 14 (1970)) Antitrust Acts. Phonetele alleges that the violations grew out of various tariffs that AT&T filed with the Federal Communications Commission (FCC) and which, the plaintiff contends, had the effect of impeding Phonetele's sales in the telecommunications marketplace.

Phonetele manufactures a device called a "Phonemaster," which is an electronic device designed to be linked to the national telephone network. Once attached to a telephone instrument, the Phonemaster prevents outgoing calls to telephones that are not in pre-selected area codes or exchanges. Thus, it can bar the completion of unauthorized or misdialed long distance calls, which in turn can result in considerable savings to telephone subscribers.

The essence of Phonetele's complaint is that the defendants have conspired to limit sales of the Phonemaster by restricting the manner in which the device can be "interconnected" with the national telephone system. Prior to

1968, tariffs[1] filed by AT&T with the FCC prohibited the interconnection of customer-provided equipment with the national telephone network. However, this practice was invalidated by the FCC in *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968). Following that decision, AT&T filed a tariff[2] that permitted interconnection so long as AT&T hardware was used to form the linkage between the Phonemaster and the telephone network. The tariff also required the customer to pay AT&T an installation charge and a monthly service fee for the interconnecting equipment. This is the tariff that is challenged in this action.

The defendants respond that they are immune from antitrust liability because this aspect of the telecommunications industry is pervasively regulated by the FCC and its counterpart agencies at the state level. They argue that when Congress mandated an extensive federal regulatory system over telecommunications by passing the communications Act of 1934 (47 U.S.C. §§ 151-609) (the "Communications Act" or the "Act"), it simultaneously effected an implicit repeal of the federal antitrust laws to the extent that they were repugnant to the regulatory program. Accordingly, the defendants have moved for judgment on the pleadings, arguing that this case should be dismissed because the regulatory scheme and the antitrust laws do not permit of mutually harmonious application. This court took the matter under submission, and now grants the motion.

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[1]As part of the regulatory regime established by the Communications Act of 1934, 47 U.S.C. §§ 151-609, AT&T is required to submit "schedules" to the FCC showing all charges between points on its system. (§ 203(a)). These schedules are called "tariffs." The regulatory framework established by the Communications Act is considered in Part II, *infra*.

[2]Revised tariff F.C.C. No. 263, filed October 22, 1968.

I.
ANTITRUST IMMUNITY

The goals of regulatory laws and antitrust statutes often are in conflict. *See FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). The former usually are predicated on the assumption that unrestrained interaction of competitive forces in a particular industry will disserve the public interest; while the latter are founded upon the premise that such unrestrained interaction will yield the best allocation of economic resources. 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 301 (1963). In certain instances, Congress has recognized that antitrust enforcement would clash so severely with the goals of a newly minted regulatory program that an express partial repeal of the antitrust laws has been made a part of the regulatory statute.[3] However, in some instances where Congress has not specifically provided for repeal, the Supreme Court has held that the antitrust and regulatory statutes are so mutually inconsistent that a partial repeal of

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[3] *E.g.*, 47 U.S.C. § 221(a) (1970) (providing that consolidations of formerly independent telephone companies, once approved by the FCC, are not subject to the antitrust laws.) Phonetele argues that this express grant of immunity in the very statute upon which AT&T relies for its implied immunity claim bespeaks a congressional intent to limit antitrust immunity in the tele-communications field to § 221(a) situations. This argument is unpersuasive. *See United States v. NASD*, 422 U.S. 694, 720 (1975) (where immunity was inferred under § 22(f) despite the inapplicability of the express immunity granted by § 22(d) of the Investment Company Act of 1940, (15 U.S.C. § 80a-22(d), (f) (1970)); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 305-310, 320 (1963) (implied immunity applicable to transactions that could not be immunized under express immunity provision of § 414 of the Federal Aviation Act (40 U.S.C. § 1384 (1970)); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, No. 74-1282, slip op. at 1200 (9th Cir. June 9, 1977) ("despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.") *See also IT&T v. General T. & E. Corp.*, 518 F.2d 913, 919 (9th Cir. 1975).

the antitrust laws should be inferred to the extent necessary to vindicate the regulatory scheme. *E.g., Pan American World Airways, Inc. v. United States, supra; United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

The Supreme Court has laid down some guidelines for applying the doctrine of such implied immunity. Thus, implicit repeals are "strongly disfavored," *United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963); should be found only "in cases of plain repugnancy between the antitrust and regulatory provisions," *Id.*; "and then only *pro tanto* to the extent of the repugnancy." *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 456 (1945). In short, repeal should be inferred only where necessary to make the regulatory program work. *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

II.

THE REGULATORY PROGRAM

An analytical starting point for a determination of whether antitrust principles are repugnant to the FCC's regulation of the interconnection of customer-owned devices with the national telephone network ("interconnection"), is a consideration of the nature of the regulatory program established by Congress. The legislative history of the Communications Act is silent on the subject of immunity.[4] However, it indicates that the FCC is to have "comprehensive jurisdiction over the [telecommunications] industry."[5] The FCC is to exercise this jurisdiction over common carriers, like AT&T, which are to make available a rapid, efficient and adequate

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[4]*See United States v. AT&T*, No 74-1698, slip op. at 6-7 (D.D.C. November 24, 1976) (order denying motion to dismiss); Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254, 269-70 n. 76 (1975).

[5]S. Rep. No. 781, 73d Cong. 2d Sess. at 3 (1934).

national communications system with service pursuant to "just and reasonable" tariffs initiated by the carriers. (§ 201(b)). In addition, the Act proscribes conduct by carriers that constitutes unjust or unreasonable discrimination in providing service (§ 202), and requires them to furnish such service "upon reasonable request therefor." (§ 201(a)).

In order to effect these goals, the Act requires a common carrier to file "schedules" (tariffs) with the FCC, setting forth the manner in which the carrier plans to operate its communications service. (§ 203(a)). No carrier may engage in business unless tariffs have been filed (§ 203(c)), nor may a carrier deviate from the tariffs unless they are properly amended. (§ 203(b)(1)). The FCC may pass on the lawfulness of tariffs by holding hearings to determine whether the tariffs are "just and reasonable" (§§ 204-205) or "in violation of any of the provisions of the [Act]." (§ 205). Hearings are commenced either upon the initiative of the FCC or upon complaints filed by interested parties. (§§ 204, 208). If, after a hearing, the Commission finds that a tariff is unlawful, it may modify it. (§ 203(b)(2)).

The FCC is also obliged to keep itself informed as to "technical developments and improvements" in the telecommunications field, so that "the benefits of new inventions and developments may be made available to the people of the United States." (§ 218) Finally, the FCC is empowered to "make such rules and regulations . . . as may be necessary in the execution of its functions" (§ 154(i)), and "as may be necessary in the public interest to carry out the provisions of [the Act]." (§ 201(b)). This "public interest" compass should guide the Commission's determination of whether a carrier-initiated tariff is "just and reasonable" (§ 201(b)) and whether, pursuant to § 205, it conforms to the general policies set forth in § 151, namely, to make available a rapid and efficient telephone system.

Although competition is a relevant component of the "public interest" it is not determinative.[6] Rather, the FCC is to measure the salutary effect that competition will have upon the quality of telecommunications service provided to the public. As Justice Frankfurter stated in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 97 (1953):

> "[T]he Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. . . . Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as this one, is not enough."

The FCC has expressed its awareness that the antitrust goals of encouraging free competition are not necessarily in harmony with the public interest standard that must govern its regulatory function.[7]

It is within the hereinabove described statutory system that the FCC has regulated interconnections. Prior to 1968, the tariff that AT&T had on file with the FCC flatly prohibited interconnection. Tariff F.C.C. No. 132 (filed April 16, 1957), superseded by tariff F.C.C. No. 263 (filed January 2, 1968). In *Carterfone*, 13 F.C.C. 2d 420, *reconsideration denied* 14 F.C.C. 2d 571 (1968), the FCC determined that such tariff was unreasonable and unlawful within the terms of § 201(b), and called upon carriers to submit new tariffs that would permit interconnection but would not "adversely affect the telephone company's operations or

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[6]*FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974). *See Panel, The Role of Competition in Transportation and Communications*, 39 Antitrust L.J. 465, 476-79 (1970) (remarks of FCC Commissioner Kenneth Cox).

[7]Memorandum of FCC as *Amicus Curiae* at 12, *United States v. AT&T*, Civil No. 74-1698 (D.D.C. filed November 20, 1974) (footnote omitted).

the telephone system's utility for others." 13 F.C.C. 2d at 424, 14 F.C.C. 2d at 573. The carriers responded in 1968 by filing new tariffs that permitted interconnection through carrier-supplied connecting arrangements, and in conjunction with carrier testing of customer-supplied equipment. The FCC was uncertain that this method was the minimum protection required to preserve the integrity of the telephone network at the lowest cost, but "exercising an abundance of caution in protecting the telephone network from possible harm allowed the tariffs to become effective[8] without ruling explicitly on their lawfulness." 40 Fed. Reg. 53013, 53014 (1975).

Between 1969 and 1972, the FCC conducted informal proceedings to assist in its evaluation of the public interest factors involved in liberalizing interconnection rules without compromising the efficiency of the national telephone network. The Commission issued technical research contracts to study the effects of interconnection and solicited comments from interested parties. *Id.* On June 14, 1972, the FCC instituted a Proposed Rule-Making aimed at determining the best approach to interconnection. 35 F.C.C. 2d 539 (1972). These proceedings remained active during 1973 and 1974 when comments were solicited about various proposals for systematic regulation of interconnection. 40 F.C.C. 2d 315 (1973). On November 14, 1975, after giving full and complete consideration to many suggested regulatory programs, the FCC proposed a "Registration Program" for customer-owned equipment. 40 Fed. Reg. 53013 (1975) (codified in 47 C.F.R. § 68 (1976)). Basically the program allows users to interconnect their equipment if it is attached through protective circuitry registered with the

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[8] *AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C. 2d 605 (1968), *reconsideration denied,* 18 F.C.C. 2d 871 (1969).

FCC or if the equipment itself is so registered. The FCC will not register a device that it concludes will present potential harm to the overall quality or safety of the national telephone network. Non-registered equipment may be attached with telephone company interface devices. The Commission's program was recently upheld by the Fourth Circuit. *North Carolina Utilities Commission v. FCC*, No. 76-1002 (4th Cir. March 22, 1977).

III

APPLICATION OF ANTITRUST IMMUNITY THEORY

It appears evident from the foregoing that if the federal antitrust laws are applied to the interconnection of customer-owned telecommunications devices, the sophisticated regulatory program of the FCC will not work. These two statutory concepts are sufficiently mutually repugnant to compel the inference that Congress intended to repeal the antitrust laws otherwise applicable to the area of interconnection.[9]

This conclusion is consistent with prior Supreme Court decisions about implied immunity, because four factors that

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[9]Phonetele's argument that defendants Western Electric and Bell Laboratories are not companies subject to the regulation of the FCC, and therefore should not be relieved under a theory of implied immunity, is not persuasive. These two defendants are accused of conspiring with AT&T within the highly regulated telecommunciations sphere, and therefore are not charged with any acts that can escape FCC regulation. *Cf. Gordon v. NYSE*, 422 U.S. 659 (1975), where the Court concluded that pervasive SEC regulation of commission rates charged by the New York and American Stock Exchanges warranted implied antitrust immunity for the regulated Exchanges *and* for two of their member firms who were also defendants. The SEC supervision that the Court found determinative regulated the Exchanges and not their member firms.

Moreover, the FCC has significant regulatory power over the vertical relationship of regulated firms. *See* 47 U.S.C. § 215 (1970), which gives the FCC the authority to inquire into the transactions of regulated common carriers with non-regulated entities that are likely to affect adversely the carrier's ability to render adequate service to the public at reasonable cost.

the Court found relevant in those cases are present here.[10] First, the acts charged in this civil suit as antitrust violations involve the "precise ingredients" of the regulatory authority vested in the FCC. *See Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 305 (1963). As the earlier discussion in this memorandum shows, Sections 201-218 of the Communications Act mandate that the Commission regularly monitor tariffs and terminate unlawful ones. The promulgation and implementation of tariffs is the principal conduct about which Phonetele complains.[11] Moreover, the previously described Registration Program (47 C.F.R. § 68 (1976)), shows that the Commission has maintained tight control over interconnection.[12]

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[10]For a comprehensive consideration of these factors, *see* Note, *AT&T and the Antitrust Laws*, 85 Yale L.J. 254 (1975).

[11]The recently decided case of *Mt. Hood Stages, Inc. v. Greyhound Corp.*, No. 774-1282 (9th Cir. June 9, 1977) is not to the contrary. There the Interstate Commerce Commission (ICC), applying a "public interest" standard (49 U.S.C. § 5(2)), approved Greyhound's acquisition of four bus companies whose routes encircle those of Mt. Hood Stages. However, the ICC had predicated its approval of the acquisitions upon Greyhound's pledge to continue to book its through-passengers on Mt. Hood Stages' lines whenever that would provide the most direct route. When Greyhound reneged on this promise, Mt. Hood Stages instituted an antitrust action and secured a judgment on a jury verdict. On appeal Greyhound pursued unsuccessfully a claim of implied antitrust immunity.

The court reasoned that the ICC had not authorized Greyhound's challenged actions when it approved the acquisitions, and in fact, was assured that such conduct would not occur. Thus, the antitrust case did not overlap the "precise ingredients" of any regulatory proceedings. In the present action, AT&T is not accused of similar attempts to subvert the FCC's determined effort to supervise interconnection. Instead, AT&T is charged with misconduct in the issuance of tariffs, an area at the center of the Commission's regulatory jurisdiction. Accordingly, the application of the antitrust laws here would intrude into the domain of the FCC, a result not required by *Mt. Hood Stages*.

[12]Phonetele's contention that some of the defendants' alleged misconduct is within the exclusive jurisdiction of state regulatory agencies, and thus escapes the FCC's supervisory authority, is not persuasive. State supervision over significant issues that relate to the interconnection of customer-provided equipment has been preempted by FCC regulation. *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied* ____ U.S. ____, 97 S.Ct. 651, 50 L. Ed. 2d 631 (1976). Thus, it is extremely doubtful that any substantial misconduct in this field will elude the regulatory net cast by the FCC.

Second, like the regulatory agencies involved in *Pan American*, 371 U.S. at 311-12, and *United States v. National Association of Securities Dealers*, 422 U.S. 694, 734 (1975), the FCC has authority to grant the relief sought in the complaint. Since the Commission can issue cease and desist orders (§ 205(a)) and modify carrier-initiated tariffs (§ 203(b)(2)), it can provide the injunctive relief that Phonetele desires. Pursuant to Sections 206-209 of the Act, the FCC can also award damages to Phonetele. *See Western States Telephone Co. v. American Telephone and Telegraph Co.*, 19 F.C.C. 2d 1068 (1969). *See also Booth v. American Telephone and Telegraph Co.*, 253 F.2d 57, 58 (7th Cir. 1958). And assuming, *arguendo*, that Phonetele has standing to seek a rebate for one of its customers, it may apply for such relief from the FCC. (§ 204(a)).

Third, competition is a component of the public interest standard that guides the Commission's regulation of interconnection.[13] The Court's decisions in *Pan American, Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975) indicate that implied immunity is logical when, in formulating its regulatory policy, the agency includes a consideration of the beneficial purposes of preserving competition.

Fourth, the FCC has considerable expertise in the field of interconnection, to which courts have deferred, *e.g.*, *Carter v. American Telephone and Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). The Supreme Court has suggested that agency expertise supports a finding of implied immunity. *Gordon*, 422 U.S. at 689-90. In light of the complex electrical engineering

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[13]See n. 6, *supra*.

questions presented by interconnection, inferred antitrust immunity, and thus deference to the FCC, are reasonable. This will prevent the application of conflicting statutory standards to the defendants and will thereby protect the integrity of the regulatory program that Congress established in the Communications Act. To hold otherwise would be to sanction the collision of the policies of the Antitrust and Communications Acts, a result that plainly would disserve the goals of both.

In reaching this conclusion, it is heartening to note that my brother Judge Lydick rendered a similar decision involving another device that is interconnected to the national telephone network. *DASA Corporation v. General Telephone Co. of California*, No. CV 73-2511-LTL (C.D. Cal. May 10, 1977).

For the reasons hereinabove set forth the defendants' motion is granted.

DATED: July 25, 1977.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX B.

Notice of Appeal.

United States District Court, Central District of California.

Phonetele, Inc., Plaintiff, vs. American Telephone and Telegraph Company; Western Electric Company, Incorporated; Bell Telephone Laboratories, Incorporated, Defendants. Case No. CV-74-3566-WPG.

Filed August 17, 1977.

NOTICE IS HEREBY GIVEN that PHONETELE, INC., plaintiff above named, hereby appeals to United States Court of Appeals for the Ninth Circuit, from the JUDGMENT DISMISSING ACTION, by which plaintiff's complaint, charging violations of the Sherman and Clayton antitrust acts, was dismissed on grounds that the Bell System defendants are immune from such laws in that case.

Judgment of the District Court was entered in the court's docket, on July 26, 1977. The names and addresses of counsel of record for the parties to the judgment are:

1. PHONETELE, INC., Plaintiff:
   SIGELMAN & STEIN
   9595 Wilshire Boulevard, Suite #900
   Beverly Hills, California 90212

2. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COM-

PANY, INC., BELL TELEPHONE LABORATORIES, INC., Defendants:

WYMAN, BAUTZER,
ROTHMAN & KUCHEL
Two Century Plaza, 14th Floor
2049 Century Park East
Los Angeles, California 90067

DATED: August 16, 1977

/s/ PAUL S. SIGELMAN
Paul S. Sigelman
SIGELMAN & STEIN

PROOF OF SERVICE.

United States District Court, Central District of California.

Phonetele, Inc., Plaintiff(s), vs. American Telephone & Telegraph Company, et al., Defendant(s). Case Number CV-74-3566-WPG.

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On August 17, 1977, I served a true copy of NOTICE OF APPEAL.

☐ by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); ☐ by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following; (List names and addresses for person(s) served. Attach additional sheets if necessary.)

Andrew M. White, Esq.
WYMAN, BAUTZER, ROTHMAN & KUCHEL
Two Century Plaza, 14th Floor
2049 Century Park East
Los Angeles, CA 90067

Place of Mailing: 9595 Wilshire Boulevard, Suite 900, Beverly Hills, CA 90212 Executed on August 17, 1977 at Beverly Hills, California.

YOU ARE REQUIRED TO CHECK ALL APPLICABLE BOXES BEFORE PRESENTING TO THE COURT FOR FILING

☐ I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.*

☐ I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.*

*Document must be notorized only if neither of these certifications is applicable.

Subscribed and sworn to before me _____ Date _____ Notary Public in and for the County of _____ State of California

/s/ Alba D. Reese
Signature of person making service

APPENDIX C.

Letter to Chief Judge.

[Letterhead]

April 9, 1981
Honorable James R. Browning
Chief Judge
Ninth Circuit Court of Appeals
P. O. Box 547
San Francisco, California 94101

Re: Phonetele, Inc. v. AT & T; Case No. 77-3877 [Presently under submission]

Dear Judge Browning:

Our office represents the appellant in the above-entitled matter.

We believe this letter is appropriate in light of the circumstances related below. The purpose of this letter is to request that the Court issue a decision in the above case.

The elapsed time from filing the notice of appeal until the date above is over 45 months. This nearly 4-year period stands in stark contrast in this Circuit to the median time of 19.3 months between filing a notice of appeal and the final disposition. *California State Bar Journal*, Vol. 56, March 1981 at p. 96.

The single issue on appeal is a purely legal one, whether or not the Bell System, or any of its parts, is entitled to implied immunity from the antitrust laws. The pending appeal is before the Court on a minimum record. Further, other cases on the Court's docket will be governed by the decision in the instant case, and, I am sure, appellants' counsel in those cases would join in this request. These other cases are *DASA v. General Telephone*, No. 77-2936,

argued concurrently with the above case, and *Selectron v. Pacific Northwest Bell Telephone*, No. 78-2529.

The notice of appeal was filed in this case in August of 1977, in excess of 3½ years ago. There have been two oral arguments; the second one took place February 6, 1980, about 14 months ago. Even before the matter was appealed, approximately 7 months were consumed on the same legal issue at the District Court level.

Counsel for the defendants were invited to join in this request, but, by letter dated April 2, 1981, they declined to join. Phonetele and its counsel thank this Honorable Court for its consideration.

Yours very truly,

/s/ RICK M. STEIN
Rick M. Stein
SIGELMAN & STEIN

RMS:jlr

cc: The Panel
Andrew M. White, Esq.
Robert B. Nicholson, Esq.,
U.S. Dept. of Justice, Intervenor
Robert L. Feiner

Opposition

Office - Supreme Court, U.S.
FILED
OCT 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-531

IN THE

Supreme Court of the United States

October Term, 1981

In re PHONETELE, INC.,

Petitioner.

Petition for Writ of Mandamus
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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No. 81-531

IN THE

Supreme Court of the United States

October Term, 1981

In re PHONETELE, INC.,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Summary of Argument

Real parties in interest American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc. ("defendants")[1] submit this brief in opposition to the petition of Phonetele, Inc. ("plaintiff") for a writ of mandamus directing the United States Court of Appeals for the Ninth Circuit to render a decision in the instant appeal. Plaintiff cannot demonstrate any truly exceptional circumstances, constituting a judicial usurpation of power, to justify the drastic remedy it seeks. In addition, plaintiff has not satisfied one of the prerequisites to issuance of such an extraordinary writ: *i.e.*, exhaustion of all other

[1]In conformity with Rule 28.1 of the Supreme Court Rules, American Tel. & Tel. Co. ("AT&T") lists its subsidiaries and affiliates that are not wholly owned, as follows: Cincinnati Bell Inc., Champaign Tel. Co., Cuban American Tel. & Tel. Co., The Pacific Tel. & Tel. Co., and Southern New England Tel. Co. Bell Telephone Laboratories, Inc. is jointly owned by AT&T and Western Electric Co., Inc., and Western Electric Co., Inc. is wholly owned by AT&T.

potential remedies in all other forums. Based on each of these failings, the instant petition must be denied.

ARGUMENT

I.

Mandamus Is an Extraordinary Remedy, Properly Invoked Only in Rare Cases.

This Court has consistently recognized that mandamus is a very drastic remedy, properly invoked only in extraordinary situations. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will* v. *United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382-385 (1953). As the Court stated in *Will* v. *United States, supra*, 389 U.S. at 95, "[o]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy [citation]." Similarly, Rule 26 of the Supreme Court Rules provides that issuance of any extraordinary writ is a matter of "discretion sparingly exercised."[2]

In view of this extraordinary nature of the mandamus remedy, the party seeking issuance of the writ must carry a very heavy burden, as the Court explained in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 662 (1978), quoting *Bankers Life and Cas. Co., supra*, 346 U.S. at 384:

> "It is essential that the moving party satisfy 'the burden of showing that its right to issuance of the writ is clear and indisputable'."

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[2]Rule 26 of the Supreme Court Rules provides as follows:

"Rule 26. Considerations governing issuance of extraordinary writs

"The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

Moreover, in order to ensure that the mandamus remedy is used only in truly extraordinary circumstances, this Court has required that, as a prerequisite to seeking mandamus, a party must establish that there are no other adequate means to attain the relief he desires. *Allied Chemical Corp., supra*, 449 U.S. at 35; *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976). The foregoing principles have been recently embodied in the 1980 amendments to the Supreme Court Rules. Rule 26 now requires a party seeking a writ of mandamus to demonstrate "that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

The instant petition must be denied because plaintiff has not established (and cannot establish) either that mandamus is justified by exceptional circumstances amounting to a judicial usurpation of power by the Ninth Circuit, or that plaintiff has exhausted every alternative means of obtaining adequate relief. For each of these reasons, defendants respectfully request that this Court deny the instant petition.

II.

Delay in Rendering a Judicial Decision Is an Insufficient Basis to Warrant a Writ of Mandamus.

The sole ground upon which plaintiff seeks a writ of mandamus is that the Ninth Circuit has not rendered a decision as quickly as plaintiff would like. Plaintiff does not argue that the Ninth Circuit has improperly rendered a decision, nor does plaintiff argue that the Ninth Circuit has decided not to render a decision. The singular thrust of plaintiff's exception to the instant proceedings is that of timeliness. However, absent a clear showing of deliberate, improper, and obstructive conduct by the Ninth Circuit, a bare showing of delay is not an extraordinary circumstance

sufficient to warrant the extreme remedy of mandamus, as a matter of law. *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *United States* v. *Fee*, 138 F.2d 158 (9th Cir. 1943). Moreover, the fact that the Ninth Circuit has not yet rendered its decision is, on its face, justifiable due to the nature of the proceedings therein and also because of the Ninth Circuit's excessive case load.

Plaintiff has failed to cite a single precedent for the proposition that delay alone in rendering a judicial decision is grounds for a writ of mandamus. This Court's decision in *Will* v. *Calvert Fire Ins. Co.*, *supra*, clearly indicates that such a rule has been rejected by the Court. In *Will* v. *Calvert Fire Ins. Co.*, this Court held that the mere failure of a district court to rule on a claim, in the absence of a "heedless refusal to proceed" or an express order abating its consideration of the claim, was not sufficient grounds for issuance of a writ of mandamus (437 U.S. at 666-667). The plurality opinion explained this conclusion as follows (*id.* at 667):

> "So far as appears, the delay in adjudicating the damages claim is simply a product of the normal excessive load of business in the District Court, compounded by 'the unfortunate consequence of making the judge a litigant' in this mandamus proceeding. [Citation.]"

Accord, United States v. *Fee*, 138 F.2d 158 (9th Cir. 1943) (delay alone in entering judgment, in the absence of a refusal to proceed, is an insufficient basis for issuance of a writ of mandamus).

As in *Will* v. *Calvert Fire Ins. Co.*, and in *United States* v. *Fee*, plaintiff in the present case does not even suggest that the Ninth Circuit's alleged delay in adjudicating this appeal is the product of a conscious, deliberate refusal to proceed on the merits. Plaintiff relies merely upon the fact that the Ninth Circuit has not yet rendered its decision. In

view of this Court's ruling in *Will* v. *Calvert Fire Ins. Co.*, *supra*, such delay is insufficient, as a matter of law, to support the issuance of a writ of mandamus. This rule of law, of course, has the beneficial effect of saving this Court (and all other appellate tribunals) from the flood of mandamus petitions which would surely flow if mandamus were recognized as an appropriate method to cure alleged delays in the judicial process.

Even if delay were grounds for mandamus, the history of the proceedings before the Ninth Circuit, even as set forth in plaintiff's petition (pp. 1-2), does not reveal any unwarranted time in considering this appeal. Although plaintiff's notice of appeal was filed on August 17, 1977, the appeal was not finally heard on oral argument before the present panel of judges until February 6, 1980. Therefore, the total amount of time that this appeal has been pending after argument to the Ninth Circuit is only nineteen (19) months. Given the severely crowded dockets facing all federal courts (including this Court), nineteen months does not represent an unwarranted delay in determining an appeal.[3] Indeed, if this Court were to determine that such a period of time, from oral argument to a final decision on the merits, constituted an "intolerable diversion from recognized standards of judicial administration" (plaintiff's petition, pp. 6-7),

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[3]The Ninth Circuit clerk has described the horrendous caseload facing the Ninth Circuit in a recent law review article. Deane and Tehan, *Judicial Administration in the United States Court of Appeals for the Ninth Circuit*, 11 Golden Gate U.L.R. 1 (1981). Due to the record number of filings before the Ninth Circuit — 3,738 new appeals filed during the court's statistical year ending June 30, 1980 — the court's pending caseload reached 4,618 cases in 1980 (*id.* at 3). As a result of this caseload, which is the highest ever experienced by the Ninth Circuit and a record high for any United States Court of Appeals in the history of the federal judiciary, civil non-priority cases (such as this case) required an average of 26.9 months to be processed through the court during 1980 (*id.*).

dozens of cases pending before all of the Courts of Appeal would be equally ripe for mandamus. *See* 1980 Annual Report of the Director of the Administrative Office of the United States Courts, page 53, Table 11.

Beyond the crowded calendar that faces every federal court, the time that the Ninth Circuit has taken to consider this case could easily be attributable to the complexity and gravity of the issues, as well as the volume of written arguments and case citations submitted to the Ninth Circuit both before and after the argument. This case involves the application of the legal doctrine of implied antitrust immunity to the extensive history of pervasive state and federal regulation of defendants' telecommunications services and equipment. Plaintiff's contention that this is an easy case (petition, pp. 5-6) is directly refuted by the volume of briefs and post-argument submissions to the Ninth Circuit. No less than 214 pages of briefs were submitted to the Ninth Circuit by plaintiff and defendants before the oral argument on February 6, 1980.[4] In the nineteen (19) months after oral argument, plaintiff has submitted new authorities to the Ninth Circuit clerk, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, on no fewer than four (4) occasions; defendants have made three (3) such submissions, most recently on October 1, 1981 (see Appendix "A" hereto).[5] Obviously, an easy case would not warrant

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[4]Plaintiff submitted an opening brief (69 pages), a reply brief (43 pages), and a supplemental brief (8 pages). Defendants submitted an opening brief (67 pages), a first supplemental brief (13 pages), and a second supplemental brief (14 pages).

[5]Plaintiff submitted additional authorities to the Ninth Circuit clerk on March 6, 1980, September 3, 1980, June 16, 1981, and June 24, 1981, and defendants responded to each of plaintiff's submissions in letters to the clerk dated, respectively, March 7, 1980, September 9, 1980, June 23, 1981, and June 30, 1981. Defendants submitted additional authorities on May 12, 1980, April 29, 1981, and October 1, 1981 (Appendix "A" hereto), and plaintiff has responded to the first two submissions in letters dated, respectively, May 15, 1980 and May 4, 1981.

six (6) briefs, totalling 214 pages, and seven (7) post-argument submissions by the parties.

The merits of the underlying appeal are not before this Court. The sole issue raised by the instant petition is whether the Ninth Circuit has abdicated clear judicial responsibilities in its consideration of this case, not what the nature of the Ninth Circuit's decision on the merits should ultimately be. In the event the merits of this case are ever fully briefed before this Court (which is not the case on the current record), the district court's dismissal of plaintiff's claim will be upheld under this Court's prior decisions applying the doctrine of implied antitrust immunity. *See Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). In any event, the current record before this Court provides no support for plaintiff's suggestion that this is an easy case or that reversal of the district court is the clear result. Given the extremely heavy caseload of the Ninth Circuit and the complexity of the issues in this case, there is no basis for plaintiff's assertion that the Ninth Circuit's consideration of this appeal has been unduly delayed. Indeed, to grant the extraordinary remedy of mandamus which plaintiff seeks would endanger the careful appellate review to which the parties are entitled and which due process requires.

III.

Plaintiff Has Failed to Exhaust Alternative Procedures to Achieve the Relief Requested.

Counsel for plaintiff alleges that he has had "extensive correspondence" with the Ninth Circuit, imploring the court to render a decision and that, despite these efforts, the Ninth

Circuit has not yet rendered its decision (petition, pp. 2-3). Plaintiff therefore suggests that there are no alternative remedies available and that a writ of mandamus is properly sought as a last resort. However, a letter from plaintiff's counsel to the Ninth Circuit clerk does not amount to an exhaustion of all available remedies before the Ninth Circuit.[6] Having failed to undertake any formal procedures before that court — such as a written motion for expedited disposition after the oral argument — plaintiff's petition is fatally defective.

As noted above, Rule 26 of the Supreme Court Rules specifically and unequivocally requires, as a prerequisite to issuance of a writ of mandamus, that plaintiff must show "that adequate relief cannot be had in any other form or from any other court." This requirement is consistent with prior case law, denying mandamus in situations such as this where the petitioner has failed to exhaust all other potential remedies in lieu of mandamus. In *Califano* v. *Moynihan*, 596 F.2d 1320 (6th Cir. 1979), the Sixth Circuit refused to issue a writ of mandamus to compel a district court to rule on the validity of certain orders entered by a United States Magistrate. The Sixth Circuit ruled that the petitioner should have filed a motion in the district court to vacate the Magistrate's orders and that, having failed to avail itself of such motion remedies in the district court, petitioner in that case could not obtain the relief requested by mandamus. Similarly, in *Elster* v. *Alexander*, 608 F.2d 196 (5th Cir. 1979), the court held that mandamus was "clearly unnec-

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[6]The letter that plaintiff submitted as Appendix "C" to its petition was not sent to Chief Judge James R. Browning, as plaintiff suggests in its petition. Plaintiff's counsel failed to submit to this Court the cover letter that accompanied Appendix "C"; said cover letter (Appendix "B" to this memorandum) indicates that plaintiff's letter was sent to the Ninth Circuit clerk, not to Judge Browning or any other judge.

essary" where the relief sought was available by motion to amend the complaint and renewed motions for class certification in the district court.

The instant petition fails to disclose any motion or other formal application to the Ninth Circuit for an expedited disposition of this appeal in the nineteen (19) months after oral argument.[7] Absent such an application to the Ninth Circuit itself, the instant petition must be denied.

Conclusion

Based upon the foregoing, defendants respectfully pray that the petition for writ of mandamus be denied.

DATED: October 14, 1981.

Respectfully submitted,

FRANK ROTHMAN
ANDREW M. WHITE
WYMAN, BAUTZER, ROTHMAN, KUCHEL & SILBERT
A partnership including professional corporations

Attorneys for Real Parties in Interest American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc.

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[7]Plaintiff's present and continuing ability to make a post-argument motion to the Ninth Circuit is reflected in the fact that plaintiff did, before oral argument, make a "motion for expedited treatment" on or about December 5, 1979, requesting that no new oral argument be held after Judge Hufstedler had recused herself and after Judge Fletcher had been added to the panel assigned to this case. The Ninth Circuit responded to plaintiff's motion promptly. While denying plaintiff's request to dispense with oral argument, the court entered an order on December 26, 1979, providing for expedited supplemental briefing and scheduling oral argument only fifteen (15) days after the supplemental brief were due (Appendix "C" hereto).

APPENDIX A.

[Letterhead of Wyman, Bautzer, Rothman, Kuchel & Silbert]

VIA EXPRESS MAIL

October 1, 1981

Mr. Richard H. Deane, Clerk
United States Court of Appeals
Ninth Judicial Circuit
7th and Mission Streets
San Francisco, California 94101

Re: Phonetele, Inc. v. American Telephone & Telegraph Company, Ninth Circuit Case No. 77-3877

Dear Mr. Deane:

We are counsel of record for defendants-appellees ("defendants") in the above-referenced appeal. Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, we should like to advise the Court of a recent decision in *United States v. Western Electric Co., Inc.*, Civil No. 17-49 (D.N.J., Sept. 3, 1981; decision on motion for construction of judgment). For the Court's convenience, a copy of the court's slip opinion is enclosed herewith.

The interpretation of the FCC's regulatory mandate embodied in *Western Electric* is virtually identical to the interpretation underlying the decision below (C.T. 478-480) and defendants' opening brief (pp. 5-22). Thus the court reviewed the "stream of regulatory events" starting with *Carterfone*, 13 FCC 2d 420, *recon. den.* 14 FCC 2d 571 (1968) and culminating with *Terminal Equipment Registration*, 58 FCC 2d 736 (1975), pursuant to which "the historical and traditional arrangement under which no piece of terminal equipment could be connected by a customer directly to the communications network was replaced by an

entirely different one," and the court found that this system is regulated by the FCC (slip op. at 8). In considering the relationship between this regulatory system and the antitrust laws, the court found that the Sherman Act

> ". . . has nothing to say about the devices, mechanisms, systems or activities by which networks for the communication of information are designed, built and operated.
>
> "That function is vested by the Congress in the Federal Communications Commission (FCC) by the much later Communications Act of 1934." (Slip op. at 13-14.)

The court also corroborated defendants' interpretation (defendants' opening brief at 53-55) of *Cantor v. Detroit Edison*, 428 U.S. 579 (1976), and confirmed defendants' contention (defendants' opening brief at 33-39) that *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), is the most relevant Supreme Court case for applying the doctrine of implied antitrust immunity to defendants' pervasively regulated conduct (slip op. at 19 fn. 2).

Respectfully submitted,

/s/ Frank Rothman
Frank Rothman
of Wyman, Bautzer, Rothman,
Kuchel & Silbert

FR:jmb
cc w/encl.: Rick M. Stein, Esq.

APPENDIX B.

[Letterhead of Sigelman & Stein]

April 9, 1981

Mr. Richard H Deane, Clerk
NINTH CIRCUIT COURT OF APPEALS
P. O. Box 547
San Francisco, California 94101

Re: Phonetele, Inc. v. AT&T
Case No.: 77-3877

Dear Mr. Deane:

Enclosed is an original letter plus three copies, which we request you distribute to the Chief Judge, James R. Browning, and the judges on the panel.

Please conform with your filing stamp the enclosed copy of this transmittal letter and return same to us in the enclosed self-addressed, stamped envelope.

Yours very truly,

/s/ Rick Stein
Rick M. Stein
SIGELMAN & STEIN

RMS:jlr
cc: Andrew M. White, Esq.

APPENDIX C.

Order.

United States Court of Appeals for the Ninth Circuit.

Phonetele, Inc., Plaintiff-Appellant, v. American Telephone and Telegraph Company; Western Electric Company, Incorporated; Bell Telephone Laboratories, Incorporated, Defendants-Appellees. No. 77-3877.

Appeal from the United States District Court for the Central District of California.

Filed December 26, 1979.

Before: KENNEDY and FLETCHER, Circuit Judges, and CLAIBORNE,* District Judge.

The court will hear oral argument in this cause on February 6, 1980 at the hour of 1:30 p.m. The court will convene in the City Council chambers, Room 220, Pasadena City Hall, 100 North Garfield Avenue, Pasadena, California.

On or before January 15, 1980 appellants may file a supplemental brief not to exceed ten (10) pages. Appellees may file a supplemental brief in response thereto, not to exceed ten (10) pages, within seven (7) days thereafter.

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*Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.